Khairuddin bin Hassan v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–91 OF 2009 (M)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND ABDULL HAMID EMBONG FCJJ
1 JULY 2010

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Possession — Knowledge — Whether elements of custody, control and knowledge established — Whether conduct of accused in running away when approached by police inferred knowledge of drugs

Criminal Procedure — Statements — Cautioned statements — Admissibility — Omission of comma in caution — Caution phrased in simple words — Accused stating that he understood caution — Whether caution rendered ambiguous

Evidence — Relevancy — Evidence relating to facts in issue — Conduct of accused — Accused running away when approached by police — Whether act of running away relevant fact — Whether accused's running away had direct bearing on offence he faced — Whether for accused to offer explanation for his conduct in running away — Whether for court to determine if such explanation credible — Evidence Act 1950 ss 8 & 9

Evidence — Statement — Cautioned statement — Admissibility — Omission of comma in caution — Caution phrased in simple words — Accused stating that he understood caution — Whether caution rendered ambiguous

The appellant and one Yusmadi were in a car driven by Yusmadi when their car was intercepted by the police. The appellant and Yusmadi attempted to flee. However, they were both apprehended after a short chase and scuffle. Immediately after the appellant's arrest, he was interrogated. He gave information that he had 3kg of ganja kept near his feet in the car. The police found a bag containing some substance later confirmed to be 2,660g of cannabis on the floor-mat of the car's front passenger seat where the appellant was seated. The appellant and Yusmadi were charged with trafficking 2,660g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution, the trial judge ordered the appellant to enter his defence but acquitted and discharged Yusmadi. The appellant read out a statement from the dock wherein he denied running away. The trial judge

admitted the information given by the appellant to the police under s 27 of the Evidence Act 1950 ('s 27 information') ('Act'). A cautioned statement (P38) recorded from the appellant was also admitted as evidence by the trial judge after conducting a voir dire to determine its voluntariness. At the close of the defence case, the trial judge rejected the appellant's defence, convicted and sentenced him to death. The appellant's appeal to the Court of Appeal was dismissed. The appellant appealed to the Federal Court. In the Federal Court, the appellant's counsel submitted, inter alia, that: (i) both the High Court and the Court of Appeal had misdirected themselves on the conduct of the appellant in fleeing the scene; (ii) since the appellant was not the sole occupant of the car, it could also be inferred that Yusmadi was in custody of all the items in the car; (iii) the elements of proximity to the drugs and conduct of flight could also be resolved against Yusmadi; and (iv) the cautioned statement (P38) was wrongly admitted due to a defective caution. Apparently, the omission of a comma rendered the caution ambiguous.

Held, dismissing the appeal:

(1) Pursuant to s 8 of the Act, the conduct of a person suspected of an offence is a relevant fact that may be considered and evaluated by the court in deciding whether the suspect committed the offence. The act of running away from the scene of an offence is such a relevant fact (see para 7).

(2) Since the appellant's act of running away had a direct bearing on the offence he faced, he had to satisfy the court as to why he had reacted in such manner. It was for the trial court to determine whether the appellant's explanation was credible or believable. The appellant's explanation was a relevant fact under s 9 of the Act and necessary for the trial court in its evaluation of the case in totality (see para 8); *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 referred.

(3) In the instant case, the trial judge had made a finding of fact that only the appellant was in physical possession of the bag containing the drugs. The appellant's conduct of running away had a nexus to what was a fact in issue, viz that he was in physical possession of that bag. This in turn gave rise to an inference that the appellant had knowledge of the drugs in the bag. It was thus up to the appellant himself to explain his conduct. It was not for the court to offer or suggest an explanation. In the instant case, it was not wrong for the trial judge to make the inference in the circumstances of the case, where the drugs were found to be in the appellant's physical possession (see para 10); *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ 386 (Rep) followed.

(4) The trial judge's finding that the appellant was in mens rea possession of the drugs, based on the appellant's conduct, his proximity to the

recovered drugs and his failure to offer a satisfactory explanation, could not be faulted. This was an inference made by the trial judge based on sound factual findings which were confirmed by the Court of Appeal. The finding was made by the learned trial judge even without considering the s 27 information. There was no justification for the Federal Court to disturb those findings (see paras 13–14).

(5) The contents of the appellant's cautioned statement (P38) accepted by the trial judge, exculpated Yusmadi and destroyed the argument that the elements of conduct and proximity could be resolved against Yusmadi (see para 15).

(6) The omission of a comma after the word 'tidak' in the phrase 'samada menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan' in the caution did not render the caution ambiguous. Immediately after the caution was read and explained to the appellant he was asked whether he understood the caution to which he said he did. The words in the caution were simple enough that even without any translation, the words would be easily understood by any Malay-speaking person. The decision of the High Court in *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289 (HC) for the need of a comma after the word 'tidak' should not be taken as good authority to question the propriety of the caution merely because of the omission of a comma. In any event, a full trial within a trial was held to determine the admissibility of the cautioned statement and no challenge was taken at that stage over the caution's ambiguity due to the comma's omission (see para 16); *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289 (HC) distinguished.

(7) The trial judge had not placed the burden of proof of voluntariness of the cautioned statement on the appellant. He had not misdirected himself (see para 17).

[Bahasa Malaysia summary

Perayu dan Yusmadi berada dalam kereta yang dipandu oleh Yusmadi apabila kereta mereka dipintas oleh polis. Perayu dan Yusmadi cuba melarikan diri. Namun begitu, mereka kedua-duanya telah ditangkap selepas kejar-mengejar dan pergelutan yang singkat. Sejurus selepas tangkapan perayu, dia telah disoal siasat. Dia telah memberikan maklumat bahawa dia mempunyai 3kg ganja yang disimpan berhampiran kakinya dalam kereta. Polis menjumpai beg mengandungi sejenis bahan yang kemudiannya telah disahkan sebagai 2,660g kanabis di alas kaki kereta di tempat duduk penumpang hadapan di mana perayu duduk. Perayu dan Yusmadi telah dituduh mengedar 2,660g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di penutup kes pendakwaan, hakim perbicaraan telah memerintahkan perayu memasuki pembelaannya tetapi telah membebas dan melepaskan Yusmadi. Perayu telah

membacakan satu penyataan dari kandang saksi yang mana dia menafikan telah melarikan diri. Hakim perbicaraan telah menerima maklumat yang diberikan oleh perayu kepada polis di bawah s 27 Akta Keterangan 1950 ('maklumat s 27') ('Akta'). Kenyataan beramaran (P38) yang telah direkodkan daripada perayu juga telah diterima sebagai keterangan oleh hakim perbicaraan selepas menjalankan voir dire untuk menentukan kesukarelaannya. Di penutup kes pembelaan, hakim perbicaraan telah menolak pembelaan perayu, mensabitkan dan menjatuhkan hukuman mati ke atasnya. Rayuan perayu ke Mahkamah Rayuan telah ditolak. Perayu telah merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan peguam perayu berhujah, antara lain, bahawa: (i) kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah salah arah berhubung perlakuan perayu melarikan diri dari tempat kejadian; (ii) memandangkan perayu bukan satu-satunya penumpang dalam kereta itu, inferens boleh dibuat bahawa Yusmadi mempunyai jagaan untuk semua barang dalam kereta itu; (iii) elemen-elemen kedekatan dadah itu dan perlakuan melarikan diri juga boleh diputuskan terhadap Yusmadi; dan (iv) kenyataan beramaran (P38) telah salah diterima disebabkan amaran yang cacat. Nampaknya, peninggalan tanda koma telah menyebabkan amaran itu taksa.

Diputuskan, menolak rayuan:

(1) Menurut s 8 Akta, perlakuan seseorang yang disyaki melakukan kesalahan merupakan fakta relevan yang patut dipertimbangkan dan dinilai oleh mahkamah dalam memutuskan sama ada orang yang disyaki itu telah melakukan kesalahan itu. Perbuatan melarikan diri dari tempat kejadian kesalahan itu merupakan fakta relevan (lihat perenggan 7).

(2) Memandangkan tindakan perayu melarikan diri mempunyai beban secara langsung ke atas kesalahan yang dihadapinya, dia perlu meyakinkan mahkamah kenapa dia bertindak sedemikian. Mahkamah perbicaraan perlu menentukan sama ada penjelasan perayu boleh dipercayai. Penjelasan perayu merupakan fakta relevan di bawah s 9 Akta dan mahkamah perbicaraan wajar membuat penilaiannya terhadap kes dengan menyeluruh (lihat perenggan 8); *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 dirujuk.

(3) Dalam kes ini, hakim perbicaraan telah membuat penemuan fakta bahawa hanya perayu yang mempunyai milikan secara fizikal ke atas beg yang mengandungi dadah itu. Perlakuan perayu melarikan diri mempunyai kaitan dengan apa yang menjadi fakta isu, iaitu bahawa dia mempunyai milikan secara fizikal ke atas beg tersebut. Ini pula telah menimbulkan inferens bahawa perayu mempunyai pengetahuan tentang dadah dalam beg itu. Oleh itu ia terpulang kepada perayu sendiri untuk menjelaskan perlakuannya. Bukan untuk mahkamah

menawar atau mencadangkan satu penjelasan. Dalam kes ini, hakim perbicaraan tidak salah untuk membuat inferens dalam keadaan kes, di mana dadah telah dijumpai berada dalam milikan fizikal perayu (lihat perenggan 10); *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ 386 (Rep) diikut.

(4) Penemuan hakim perbicaraan bahawa perayu mempunyai mens rea milikan dadah itu, berdasarkan perlakuan perayu, kedekatannya dengan dadah yang ditemui dan kegagalannya memberikan penjelasan memuaskan, tidak boleh dipersalahkan. Ini adalah inferens yang dibuat oleh hakim perbicaraan berdasarkan penemuan faktual yang kukuh yang telah disahkan oleh Mahkamah Rayuan. Penemuan itu telah dibuat oleh hakim perbicaraan yang bijaksana tanpa mengambilkira maklumat s 27. Tiada justifikasi untuk Mahkamah Persekutuan campur tangan penemuan tersebut (lihat perenggan 13–14).

(5) Kandungan kenyataan beramaran perayu (P38) yang telah diterima oleh hakim perbicaraan, telah membebaskan Yusmadi dan menghapuskan hujah bahawa elemen-elemen perlakuan dan kedekatan boleh diputuskan terhadap Yusmadi (lihat perenggan 15).

(6) Peninggalan tanda koma selepas perkataan 'tidak' dalam frasa 'samada menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan' dalam amaran itu tidak mengakibatkan amaran itu taksa. Sejurus selepas amaran itu dibaca dan dijelaskan kepada perayu dia ditanya sama ada dia memahaminya dan dia mengiakannya. Perkataan-perkataan dalam amaran itu begitu mudah dan tanpa perlu diterjemahkan, perkataan-perkataan itu boleh difahami dengan mudah oleh sesiapa sahaja yang menggunakan Bahasa Melayu. Keputusan Mahkamah Tinggi dalam kes *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289 (MT) tentang perlunya tanda koma selepas perkataan 'tidak' tidak patut diambil sebagai autoriti yang baik terhadap persoalan kesesuaian amaran hanya kerana peninggalam tanda koma. Walau bagaimanapun, perbicaraan dalam perbicaraan yang penuh telah diadakan bagi menentukan kebolehterimaan kenyataan beramaran itu dan tiada cabaran telah diambil di peringkat itu berhubung ketaksaan amaran itu disebabkan peninggalan tanda koma itu (lihat perenggan 16); *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289(MT) dibeza.

(7) Hakim perbicaraan tidak meletakkan beban bukti kesukarelaan kenyataan beramaran ke atas perayu. Beliau tidak melakukan salah arah (lihat perenggan 17).]

Notes

For cases on cautioned statement under criminal procedure, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4365–4372.

For cases on cautioned statement under evidence, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2492–2511.
For cases on evidence relating to facts in issue, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2364–2365.
For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Chan Kwok Keung & Anor v The Queen [1990] 1 CLJ 411; [1990] 3 CLJ 386 (Rep), CA (folld)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Foo Jua Eng [1966] 1 MLJ 197; [1965] 1 LNS 127 (refd)
PP v Kamde bin Raspani [1988] 3 MLJ 289, HC (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 37(da)(vi), 39B(1)(a)
Evidence Act 1950 ss 8(2), 9, 27

Appeal from: Criminal No M-05–27 of 2004 (Court of Appeal, Putrajaya)

Hisyam bin Abdullah @ Teh Poh Teik (Teh Poh Teik) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdull Hamid Embong FCJ (delivering judgment of the court):

[1] The appellant was convicted by the High Court on a drugs trafficking charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). His appeal to the Court of Appeal was dismissed on 29 April 2009.

[2] The drugs concerned in this case was 2,660g of cannabis, packed in three transparent plastic bags kept inside a bag, which was found on the floor mat of the front passenger seat in the car where the appellant was seated. The car was driven by one Yusmadi, who was jointly charged with the appellant but acquitted without his defence called.

[3] A cautioned statement ('P38') recorded from the appellant was admitted as evidence by the trial judge after conducting a voir dire to determine its voluntariness. A piece of information given by the appellant to the police during an interrogation session immediately after the appellant's arrest was also admitted as evidence pursuant to s 27 of the Evidence Act 1950. In that information (exh P21A), the appellant told the police that he had kept three kilograms of ganja near his feet under the seat next to the driver. At the trial the appellant claimed that he had given that information as a result of being

roughed up by the police, that he was kicked and punched by them during the interrogation. The learned trial judge found from the evidence that there was no use of force by the police and admitted that s 27 information. The Court of Appeal in reviewing that part of the evidence found no error on the part of the learned trial judge, in accepting the version of the prosecution and rejecting the appellant's version. We agree with both findings.

[4] When the car carrying the drugs was accosted by the police at 11pm on the night of 7 August 2001, both the driver (Yusmadi) and the appellant attempted to escape. They were however immediately apprehended after a short chase and scuffle. The learned trial judge relied, inter alia, on this conduct of the appellant trying to escape in coming to the conclusion that the appellant had actual possession of the drugs and thereby concluding that a prime facie case against him had been proven.

[5] The Court of Appeal affirmed the finding that the appellant had mens rea possession of the drugs and concluded that the prosecution had established the element of actual possession without the aid of the presumption under s 37(d) of the Act, and thus, invoked the presumption of trafficking under s 37(da)(vi) of the Act against the appellant.

[6] Before us it was submitted by the appellant's counsel that both the High Court and the Court of Appeal had misdirected themselves as to the conduct of the appellant in fleeing the scene by placing too much dependence on that evidence as a telling factor in respect of the knowledge of the appellant of the drugs at his feet. It was argued that the learned trial judge had failed to put that evidence to the maximum evaluation test in coming to that conclusion. It was contended that since the appellant was not the sole occupant of the car and that Yusmadi was in custody and control of the car it may be inferred that he, Yusmadi, was also in custody of all items in that car. Learned counsel cited the case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1, in submitting that a miscarriage of justice had occurred when the trial judge failed to view all the evidence objectively. Learned counsel also argued that the elements of proximity to the drugs and conduct of flight can also be resolved against Yusmadi. Thus it was wrong for the learned trial judge to have concluded, based on these same two elements, that it was the appellant who was in possession of the drugs.

[7] The conduct of one suspected of an offence is a relevant fact which may be considered and evaluated by the court in coming to a conclusion on whether the suspect perpetrated the offence. Section 8(2) of the Evidence Act 1950 states that:

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

The act of running away from the scene of an offence is certainly a relevant fact as can be seen from this illustration under that subsection:

(f) The question is whether A robbed B.

The facts that after *B* was robbed, *C* said in *A*'s presence: 'The police are coming to look for the man who robbed *B*' and that immediately afterwards *A* ran away are relevant.

[8] Since the appellant's act of flight had a direct bearing on the offence he faced, he must satisfy the trial court why he reacted in that manner. The trial court, having had the advantage of seeing and hearing the appellant's explanation is the best forum for determining whether such an explanation is credible or believable. This explanation to rebut any inference detrimental to his defence becomes a relevant fact under s 9 of the Evidence Act, and necessary for the trial court in its evaluation of the case in totality. Section 9 of the Evidence Act states that:

Facts necessary to explain or introduce a fact in issue or relevant fact, *or which support or rebut an inference suggested by a fact in issue or relevant fact,* or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose. (Emphasis added.)

[9] In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, the Federal Court explains the need for this explanation of an accused person's conduct in this manner:

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. *The explanation for his reaction must therefore be offered by he himself as required by* s 9. *The court cannot, on its own, offer an explanation for his reaction* … (Emphasis added.)

[10] In this case, the learned trial judge had made a finding of fact that the appellant, and he alone, was in physical possession of the bag containing the drugs. The appellant's conduct of running away has a nexus to what is now a fact in issue, viz that he was in physical possession of that bag. This in turn gives

rise to an inference that he had knowledge of the drugs in the bag. It is thus up to the appellant himself to explain his conduct, and not for the court to offer or suggest one. *Chan Kwok Keung & Anor v The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ 386 (Rep) is authority for the proposition that an act of running away may be viewed as an admission of guilt. The learned trial judge was therefore not wrong in making that inference in the circumstances of this case, where the drugs was found to be in the appellant's physical possession.

[11] In his defence, read from a statement from the dock, the appellant said that he never ran away and this explanation was rejected by the judge. It is trite that, a trial judge, with audio-visual advantage of the witnesses, is entitled to accept one version and reject a contradictory version of any evidence adduced at the trial. There was no allegation during cross-examination of the prosecution witnesses that the police had attempted to fix up the appellant, or that they had acted with malice against him or even that they had cooked up a story about the appellant running away.

[12] As regards the proximity of the drugs to the appellant, this too is a relevant fact. This principle is derived from this passage in *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197; [1965] 1 LNS 127, where HRH Raja Azlan Shah stated:

> With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

[13] As such we cannot find fault with the finding of the learned trial judge that, based on both the elements of the conduct of the appellant and his proximity to the recovered drugs, coupled with his failure to give any satisfactory explanation, he was in mens rea possession of the drugs. This was an inference made by the learned trial judge based on sound factual findings which is now confirmed by the Court of Appeal. We find no justification in disturbing those findings.

[14] It is convenient at this point to mention that this finding was made by the learned trial judge even without considering the s 27 information. In his judgment, the learned trial judge said this:

> Oleh itu saya memutuskan bahawa tanpa mengambilkira pernyataan OKT kedua di bawah s 27 Akta Keterangan 1950 pun, terdapat keterangan yang mencukupi untuk membuktikan secara factual bahawa OKT kedua mempunyai *possession* dadah berbahaya yang terkandung dalam bungkusan *plastic* hitam ('P8').

[15] As regards the role of Yusmadi, the learned trial judge after considering the two elements of conduct and proximity mentioned earlier also took into consideration P38, the cautioned statement of the appellant. And the learned judge accepted totally what was said in P38 including that part which exculpates Yusmadi fully from the offence for which both are charged. We reproduce below this passage from the judgment of the learned trial judge, which clearly demolishes the submission that these two elements of conduct and proximity can be resolved against Yusmadi.

> Jika keterangan-keterangan yang telah disebutkan itu ditimbang secara keseluruhannya, ia boleh membawa kepada inferensi bahawa pada masa yang material OKT pertama (Yusmadi) sedang mengangkut (*transporting*) dadah berbahaya yang ada dalam kereta tersebut. Tetapi untuk membolehkan kesimpulan tersebut dibuat, mestilah terdapat keterangan yang mencukupi untuk membuktikan bahawa OKT pertama sedar atau mempunyai pengetahuan tentang dadah berbahaya dalam kereta yang dipandunya itu. Sehubungan ini, keterangan bahawa dia telah melarikan diri dari kereta tersebut boleh membawa kepada kesimpulan bahawa OKT pertama tahu bahawa dalam kereta itu ada dadah berbahaya. Tetapi untuk membuktikan prima facie kes terhadap OKT pertama, kesimpulan itu hendaklah merupakan kesimpulan yang mesti dibuat dari keseluruhan keterangan yang ada di hadapan mahkamah. Di sinilah P38 menjadi relevan. Di bahagian akhir dalam P38, OKT kedua menyatakan, 'cuma saya nak bagi tahu yang kawan saya Ismadi (ie Yusmadi) tidak tahu ada dadah dalam kereta, kerana saya cuma minta dia bawa saya ke Melaka. Kereta itu dia yang punya. Itu saya nak tambah, lain tidak ada.

[16] The next issue argued was in respect of the correctness of the admission of P38, the cautioned statement. The attack on the correctness for its admission was two-pronged. Firstly, learned counsel submitted that the caution read to the appellant is ambiguous in that a comma is missing after the word 'tidak' in the caution which reads:

> Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu, bahawa kamu tidaklah diwajibkan berkata sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, sama ada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan.

It was submitted that without the comma, the caution could mean that what the appellant said could be used in evidence or that it could not be used in evidence against him. Reference was made to the High Court decision of *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289, where the same issue arose and that this flaw in the caution was found to be fatal, and as such, the caution statement inadmissible.

We have read and re-read the words of the caution in P38 and found that, even without the comma, there is no ambiguity in the caution. We notice that immediately after the caution was read and explained to the appellant (who is a Malay), he was asked whether he understood the caution to which he said he

did. We find the words in the caution simple enough that, even without any translation, would be easily understood by any Malay speaking person. We say that the interpretation given by the High Court in *Kamde* is overstretching the significance for the need of a comma after the word 'tidak' and should not be taken as good authority to question the propriety of the caution merely because of the omission of a comma. The caution is after all a record in writing of what was said to the appellant. The phrase 'sama ada menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan' cannot be said even without pausing after the word 'tidak', that the caution will not make sense, or that its meaning is ambiguous. To us this is a non-issue. Furthermore, a full trial within a trial was held to determine the admissibility of the cautioned statement. And we find no challenge at that stage that the need for a comma had made the caution ambiguous or had misled the appellant in any way, when he voluntarily gave his statement in P38.

[17] The second line of attack for admitting P38 as evidence is focused on the misdirection of the learned trial judge who, it was submitted, wrongly placed the burden of proof of voluntariness on the appellant. Learned counsel cited this line from the judgment to support his submission:

> Ertinya, OKT kedua perlu menunjukkan bahawa dorongan, ugutan atau janji yang didakwa itu telah mempengaruhi fikirannya untuk memberikan percakapan itu.

We do not agree that what the learned trial judge said in the passage quoted above means that he had placed the burden of proof on the admissibility of P38 on the appellant. What that passage merely means is that the appellant needs to adduce evidence of any elements of inducement, threat or promise to nullify the voluntary nature of his cautioned statement. We have scrutinised that part of the judgment on the conduct of the trial within a trial which runs into 31 pages and find no flaw in the decision of the trial judge to admit P38. As regards to the burden, we are satisfied that the learned trial judge had not misdirected himself. His Lordship was in fact on the right track when he made his conclusion on the burden placed on the prosecution in this trial within a trial, by saying:

> Saya akur bahawa OKT kedua hanya perlu menimbulkan keraguan yang munasabah bahawa ID38 telah tidak diberi secara sukarela. Setelah menimbangkan keseluruhan keterangan dalam perbicaraan, saya memutuskan bahawa pihak pendakwa telah membuktikan melampaui keraguan yang munasabah bahawa percakapan dalam ID38 telah diberi oleh OKT kedua secara sukarela. Saya telah menerima ID38 itu masuk dalam keterangan dan dikemukakan sebagai P38.

[18] For these reasons, this appeal is dismissed and the conviction and sentence imposed by the High Court are affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon